

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-195

RICHARD REICHEL, *Petitioner*,

v.

THE DISTRICT 27,
UNITED STEELWORKERS, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS
IN OPPOSITION

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OPINION BELOW

Petitioner erroneously appeals from a "judgment" by the Supreme Court of Ohio. At page 1 of his Petition, Petitioner prays that:

" . . . a writ of certiorari issue
to review the judgment by the Supreme Court of Ohio rendered in
these proceedings on May 5, 1978."

Said "decision" by the Supreme Court of Ohio (ap-

ended to the Petition for a Writ Certiorari) is merely the Supreme Court of Ohio's refusal to grant certiorari and hear the case. The final decision in this case is the decision of the Court of Appeals for Stark County, Ohio (appended as "Appendix A" to Petitioner's brief), and Petitioner did not appeal from that decision to the United States Supreme Court.

Therefore, because the Supreme Court of Ohio refused discretionary review, the proper appeal herein would have been from the judgment of the Court of Appeals for Stark County, Ohio. *Interstate Circuit, Inc. v. Dallas* (1967), 390 U.S. 676, 678; *Gallick v. Baltimore & Ohio R. Co.* (1963), 372 U.S. 108, 109; *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1953), 347 U.S. 157, 159.

As Petitioner has appealed from a non-existent decision, the Petition for a Writ of Certiorari should be denied.

JURISDICTION

At page 2 of his brief, Petitioner invokes

jurisdiction under 28 U.S.C.A., Section 1254(1). This section clearly provides for review from cases in the Federal courts of appeals, and does not provide jurisdiction in this case.

Because this Court has no jurisdiction under 28 U.S.C.A., Section 1254(1), Petitioner's Writ should be denied.

QUESTIONS PRESENTED

Neither question presented by Petitioner was raised in the Ohio Court of Appeals or in Petitioner's Memorandum to the Ohio Supreme Court.

As Petitioner did not heretofore claim any constitutional deprivation under the First and Fourteenth Amendments, it is submitted the same cannot now be raised.

STATEMENT OF FACTS

This case arose out of Petitioner's unsuccessful attempt at election to the Ohio Senate in 1974. He had held the Senate seat in the Ohio Legislature by appointment.

Plaintiff claimed that a leaflet issued by the defendants was libelous and caused his election loss.

The leaflet erroneously stated that the plaintiff had voted for certain legislation which was unfavorable to the working man in 1963. Plaintiff, however, was not in the Legislature at that time.

The Ohio Court of Appeals said:

" . . . the appellants (Respondents herein) did show that in their minds . . . (Petitioner) did assume positions as legislator which were consistent with the views they erroneously attributed to him in 1963. Therefore, there appeared no obvious reasons to doubt the factual assertions contained in the leaflet." (Parenthetical matter added.) (Opinion, Court of Appeals, set forth in Petition for Certiorari [hereinafter Pet. Cert.], page 13.)

From a verdict in Petitioner's favor, Respondents herein appealed. The Court of Appeals in Ohio reversed the judgment of the Ohio trial court and directed the verdict in Respondents' favor. The Ohio Supreme Court refused Petitioner's motion for certiorari.

Among the state issues raised in the Court of Appeals was an Assignment of Error that the plaintiff had not proven any damages. The Court of Appeals said:

"It is elementary under Ohio law that . . . no cause of action is stated unless special damages are pleaded and proven." (Opinion, Pet. Cert., p. 33)

The Court of Appeals held that plaintiff failed to prove any special damages.

The Court of Appeals, in deciding this case on the non-state issues, said:

"Our focus is, therefore, narrowed to the single issue of whether the judgment below is supported by clear and convincing proof that appellants published the leaflet with reckless disregard of whether the contents were true." (Opinion, Pet. Cert., p. 13)

The Court of Appeals then proceeded to hold on this issue:

"On the basis of this evidence, we conclude that each of the appellants (Respondents herein) were entitled to a directed verdict in their favor because of the failure of Appellee (Petitioner herein) to meet his burden of proof by clear and convincing evidence that the leaflets were published with

a high degree of awareness of probable falsity of the contents therein." (Parenthetical matter added.) (Opinion, Pet. Cert., p. 19)

With respect to the evidence, the Court of Appeals said:

"Nor does the record reveal facts which would under any standard of liability . . . establish that there was obvious reason to doubt the veracity of the report." (Opinion, Pet. Cert., p. 23)

ARGUMENT

I

THE STATE COURT DECISION IS BASED UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND AND PRECLUDES REVIEW OF THIS CASE.

This Court has long adhered to the fundamental principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal or constitutional question may be involved. *Fox Film Corp v. Miller* (1935), 296 U.S. 207; *Herb v. Pitcairn* (1944), 324 U.S. 117.

In reversing the judgment of the trial court

herein, the Court of Appeals determined that Respondents were entitled to a directed verdict because no special damages were established to support the judgment.

The Court of Appeals correctly noted that under Ohio law, no cause of action is stated unless special damages are pleaded and proven. The Court concluded that, under Ohio law, Petitioner could not create special damages by his gasoline expense in driving to media centers on the day before the election to distribute a statement counteracting the leaflet. *Becker v. Toulmin* (1956), 165 Ohio St. 549; *Bigelow v. Brunley* (1944), 138 Ohio St. 574.

Because the Court of Appeals' disposition of this issue required it to reverse the judgment in favor of Respondents, independent of any other issues in the case, this Court lacks jurisdiction to hear this appeal.

II

THE DECISION BELOW PROPERLY APPLIED THIS COURT'S REQUIREMENTS SET FORTH IN *NEW YORK TIMES v. SULLIVAN* AND ITS PROGENY, WITH RESPECT TO PROOF OF ACTUAL MALICE IN CASES INVOLVING PUBLIC OFFICIALS.

Since the landmark case of *New York Times v. Sullivan* (1964), 376 U.S. 254, this Court has required that in a libel suit against a public official, there can be no recovery for defamation unless the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, at 279. *New York Times* provides further that there be clear and convincing proof of such actual malice.

Although later cases have redefined actual malice (in *St. Amant v. Thompson* [1968], 390 U.S. 727, 731, the Court defined "reckless disregard" as entertaining serious doubts as to truth of the publication), this Court has not deviated from the requirement that "actual malice" be established.

In his Petition to this Court, Petitioner does not contend that the state courts have incorrectly applied the *New York Times* criteria, but instead argues that such criteria should not be applicable in an election campaign. Petitioner cites no cases for this novel theory.

Not only would acceptance of Petitioner's argument require a reversal of *New York Times*, but would be contrary to the underlying philosophy of the *New York Times* that "debate on public issues should be uninhibited, robust, wide open"

The state reviewing courts, fulfilling its obligation to make an "independent examination of the whole record", *Edwards v. South Carolina* (1963), 372 U.S. 229, 235, properly determined that there was not clear and convincing evidence of actual malice to support the trial court's judgment.

Petitioner really is asking this Court to reweigh the evidence. Such request does not present a substantial constitutional issue.

It is apparent that Petitioner points to no conflict between any Supreme Court case and the Ohio Court of Appeals' decision. Said appellate decision does not enunciate any new principle of law. The effect of the decision is limited to the Petitioner himself because the Ohio Appellate Court held that he did not meet his burden of proof.

Further, Petitioner has attempted to argue by his questions presented that he has been deprived of unspecified rights under the First and Fourteenth Amendments of the United States Constitution by the action of the Ohio Supreme Court. Significantly, in his Memorandum urging the Ohio Supreme Court to hear his case, Petitioner did not raise any claim of constitutional deprivation under the First or Fourteenth Amendments. Nor did he in his argument to the Ohio Court of Appeals raise any claim of federal constitutional deprivation.

CONCLUSION

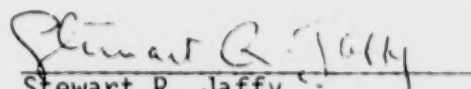
Petitioner has offered no valid reason for the Petition for a Writ of Certiorari to be accepted. As heretofore set forth, there is a valid state issue which resolves this cause independent of any other argument.

Petitioner in his attempt to raise a federal constitutional issue, presents questions not previously raised.

Petitioner raises no substantial constitutional question, but rather is really asking the Court to re-weigh the evidence.

For the aforesaid reasons the Writ should be refused.

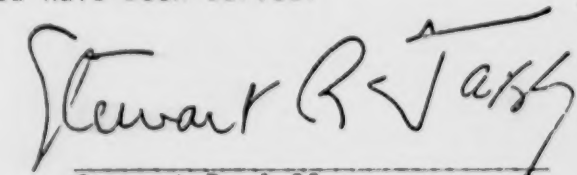
Respectfully submitted,


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PROOF OF SERVICE

I, Stewart R. Jaffy, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of August, 1978, I served copies of the foregoing Respondents' Brief in Opposition upon Edgar W. Jones, attorney for Petitioner, addressed to him at Amerman, Burt & Jones Co., 250 Peoples-Merchants Trust Building, Canton, Ohio 44702, by depositing same in the United States mail, postage prepaid. I certify that all parties required to be served have been served.



Stewart R. Jaffy

Attorney for Respondents